UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges
San Francisco, California

MONTECITO HEIGHTS HEALTHCARE & WELLNESS CENTRE, LP

and **Case 31-CA-129747**

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED LONG TERM CARE WORKERS

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

To: The Honorable Lisa Thompson
Administrative Law Judge
National Labor Relations Board
901 Market Street, Suite 300
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Submitted by:

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I. INTRODUCTION

This case was submitted to the Honorable Lisa Thompson, on May 12, 2016 pursuant to a Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts submitted by Respondent Montecito Heights Healthcare & Wellness Centre, LP ("Respondent") and Counsel for the General Counsel.[1] As the Charging Party Union did not join in the Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts ("the Motion"), Judge Thompson, on May 12, 2016, issued an order to show cause as to why the Motion should not be granted. On May 19, 2016, Charging Party Service Employees International Union, United Long Term Care Workers ("Charging Party") filed its response to the order to show cause. On June 2, 2016, Judge Thompson granted the Motion. The instant proceedings are based upon an Amended Complaint and Notice of Hearing ("Amended Complaint") issued by the Regional Director of Region 31 on October 14, 2015 [GC Exh. 1(aa)]. The Amended Complaint alleges that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an Alternative Dispute Resolution Policy and Agreement To Be Bound By Alternative Dispute Resolution Policy ("Arbitration Program"). This Arbitration Program, if signed by employees, requires them to waive the right to bring or participate in class or collective actions in all forums, whether arbitral or judicial.

The Amended Complaint is based upon a charge filed by Charging Party on May 30, 2014 [GC Exh. 1(a)], first amended on July 25, 2014 [GC Exh. 1(d)], second amended on August 11, 2014 [GC Exh. 1(g)], and third amended on October 6, 2014 [GC Exh. 1(j)].

[1] References to the Record are abbreviated as follows: Jt. Motion followed by paragraph number or page number (Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts); Jt. Exh. followed by the page number (Joint Exhibits); and GC Exh. followed by the page number (General Counsel Exhibits).

II. STATEMENT OF ISSUES[2]

Whether Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining Respondent's Arbitration Program, which if signed by employees, requires employees to waive the right to bring or participate in class or collective actions in all forums, whether arbitral or judicial.

III. FACTS

Respondent is a healthcare institution that engages in the operation of a skilled nursing facility with an office and place of business in Los Angeles, California. [Jt. Motion at ¶ 10(a)]. In conducting its operations, Respondent annually derives gross revenues in excess of $100,000 and purchases and receives at its Los Angeles, California facility, materials and services valued in excess of $5,000 directly from suppliers outside the state of California. [Jt. Motion at ¶ 10(c)-(d)]. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. [Jt. Motion at ¶ 10(e)].

Since at least December 6, 2013, Respondent, by distributing a packet of documents to employees, promulgated and since then has maintained an Alternative Dispute Resolution Policy [Jt. Motion at ¶ 14(a); Jt. Exh. 1] and Agreement To Be Bound By Alternative Dispute Resolution Policy [Jt. Motion at ¶ 14(a); Jt. Exh. 2]. The Respondent's Alternative Dispute Resolution Policy contains the following provisions:

> For parties covered by this Alternative Dispute Resolution Policy, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes (as defined below); no other action may be brought In court or in any other forum. This agreement is a waiver of all rights to a civil court action for a covered dispute; only an arbitrator, not a Judge or Jury, will decide the dispute.

[2] Jt. Motion at p.5.

CLASS ACTION WAIVER

I understand and agree this ADR Program prohibits me from Joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others.

[Jt. Exh. 1 at p. 1-2]. The Respondent's Agreement To Be Bound By Alternative Dispute Resolution Policy contains the following provisions,

PLEASE NOTE: Nothing contained in this Agreement To Be Bound By Alternative Dispute Resolution Policy is intended to require arbitration of any matter or claim which the courts of this jurisdiction have expressly held are not subject to mandatory arbitration.

IN CONSIDERATION FOR AND AS A MATERIAL CONDITION OF EMPLOYMENT WITH MONTECITO HEIGHTS HEALTHCARE WELLNESS CENTRE AND IN CONSIDERATION FOR THE COMPANY'S RETURN AGREEMENT TO BE BOUND BY THE COMPANY'S ADR PROGRAM AND HAVE ANY AND ALL CLAIMS ARISING OUT OF THE EMPLOYMENT RELATIONSHIP IT MAY ENJOY AGAINST ME RESOLVED IN THIS FORUM, AND PAY THE ARBITRATION FEES AS DESCRIBED THEREIN, IT IS AGREED THAT THE ALTERNATIVE DISPUTE RESOLUTION POLICY ATTACHED HERETO WHICH PROVIDES FOR FINAL AND BINDING ARBITRATION, IS THE EXCLUSIVE MEANS FOR RESOLVING COVERED DISPUTES; NO OTHER ACTION MAY BE BROUGHT IN COURT OR IN ANY OTHER FORUM. I UNDERSTAND THAT THIS AGREEMENT IS A WAIVER OF ALL RIGHTS TO A CIVIL COURT ACTION FOR ALL DISPUTES RELATING TO MY EMPLOYMENT, THE TERMS AND CONDITION OF MY EMPLOYMENT AND/OR THE TERMINATION OF MY EMPLOYMENT WHETHER BROUGHT BY ME OR THE COMPANY; ONLY AN ARBITRATOR, NOT A JUDGE OR JURY, WILL DECIDE THE DISPUTE.

IN ADDITION, I UNDERSTAND I AM PROHIBITED FROM JOINING OR PARTICIPATING IN A CLASS ACTION OR REPRESENTATIVE ACTION, ACTING AS A PRIVATE ATTORNEY GENERAL OR REPRESENTATIVE OF OTHERS, OR OTHERWISE CONSOLIDATING A COVERED CLAIM WITH THE CLAIM OF OTHERS. (Emphasis in original).

I also acknowledge and agree that the following types of disputes are expressly excluded and not covered by this policy: (a) disputes related to workers' compensation and unemployment insurance; and (b) disputes or claims that are expressly excluded by federal or state statute or are expressly required to be arbitrated under a different procedure pursuant to the terms of an employee benefit plan. I also acknowledge and agree that nothing in this ADR policy shall be construed as precluding any employee from filing a charge with a state or federal administrative agency, such as the U.S. Equal

> Employment Opportunity Commission ("EEOC") or the National Labor Relations Board. A state or federal administrative agency would also be free to pursue any appropriate action. However, any claim that is not resolved administratively through such an agency shall be subject to this agreement to arbitrate and the ADR policy.

[Jt. Exh. 2 at p. 1-2].

Since about December 6, 2013, Respondent, by distributing a packet of documents to employees, presented the Alternative Dispute Resolution Policy and Agreement To Be Bound By Alternative Dispute Resolution Policy to its employees and some of those employees signed the Agreement To Be Bound By Alternative Dispute Resolution Policy as a condition of continued employment and returned it to the Respondent. [Jt. Motion at ¶ 14(b)].

IV. ANALYSIS

A. RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY PROMULGATING AND MAINTAINING ITS ARBITRATION PROGRAM

i. RESPONDENT REQUIRED EMPLOYEES TO BE BOUND BY THE ARBITRATION PROGRAM AS A TERM AND CONDITION OF EMPLOYMENT.

The parties stipulated that Respondent, by distributing a packet of documents on or about December 6, 2013 that contained the Agreement To Be Bound By Alternative Dispute Resolution Policy, promulgated and since then has maintained an Alternative Dispute Resolution Policy and Agreement To Be Bound By Alternative Dispute Resolution Policy. However, the parties dispute whether Respondent's Arbitration Program was a term and condition of employees' employment. The evidence, however, establishes that the Arbitration Program was a term and condition of employment for those employees presented with the Arbitration Program and who signed it. First, the language of the Respondent's Arbitration Program that was presented to employees does not indicate that employees had the option not to sign. Thus, a reasonable employee would view the Arbitration Program as a term and condition of employment. Second, the language of the Agreement To Be Bound By Alternative Dispute

Resolution Policy states, "*IN CONSIDERATION FOR AND AS A MATERIAL CONDITION OF EMPLOYMENT*…IT IS AGREED THAT THE ALTERNATIVE DISPUTE RESOLUTION POLICY ATTACHED HERETO…IS THE EXCLUSIVE MEANS FOR RESOLVING COVERED DISPUTES." Emphasis added. Moreover, the Respondent stipulated that the Arbitration Program was a condition of employment for those employees of Respondent who did sign the Agreement to Be Bound by Alternative Dispute Resolution Policy.

Based on the above, the evidence shows that the Respondent promulgated its Arbitration Program and that employees were required to be bound by the Program.

In *D.R. Horton*, 357 NLRB No. 184, slip op. at 1-7 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against the employer in both judicial and arbitral forums violates Section 8(a)(1) of the Act because this type of agreement restricts employees' Section 7 right to engage in concerted action for mutual aid or protection. In particular, the Board held in *D.R. Horton* that,

> [an] employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer.

Id., slip op. at 1. The Board reaffirmed *D.R. Horton's* holdings in *Murphy Oil,* 361 NLRB No. 72 (2014).

In *D.R. Horton,* the Board set forth the appropriate legal framework for considering the legality of employers' arbitration agreements that limit collective and class legal activity in judicial and arbitral forums. *D.R. Horton*, 357 NLRB slip op. at 1-7. In determining whether a rule or agreement applied to all employees, as a condition of employment, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). Under that test, if the rule explicitly restricts activities protected by Section 7 of that Act,

it is unlawful. *Id.* at 646. If the rule does not explicitly restrict protected activity, it violates the Act upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or, (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647.

In this matter, Respondent's Arbitration Program interferes with employees' Section 7 right to participate in collective or class litigation. Both the Alternative Dispute Resolution Policy and Agreement To Be Bound By Alternative Dispute Resolution Policy explicitly state that an employee signing the Agreement To Be Bound By Alternative Resolution Policy is prohibited from "joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others." Consequently, as the Arbitration Program precludes employees from filing employment-related collective or class claims in both judicial and arbitral forums, it has been applied to restrict the exercise of Section 7 rights. Employees have been effectively foreclosed from pursuing employment-related class claims against Respondent. Therefore, Respondent's mandatory Arbitration Program is unlawful as applied and violates Section 8(a)(1) of the Act. See *Lutheran Heritage Village-Livonia.* 343 NLRB at 647.

ii. EVEN IF THE ARBITRATION PROGRAM WAS NOT MANDATORY, ITS PROMULGATION AND MAINTENANCE NONETHELESS VIOLATES THE ACT

Even if the Arbitration Program was not a term and condition of employment, and employees could voluntarily choose whether or not to sign it as Respondent will assert, the Arbitration Program nevertheless violates the Act. In *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), the Board made clear that individual arbitration agreements that prevent an employee from engaging in concerted legal activities must yield to the Act, whether or not they were a condition of employment. 362 NLRB slip op. at 7.

> Whether those agreements are imposed on employees by employers, or whether employees are free to reject them, makes no difference either to the legality of such agreements under the NLRA or to any required accommodation between the NLRA and FAA.

Id. More recently, the Board held, in *Bristol Farms*:

> [w]hether or not the Agreement could be described as voluntary in some sense is irrelevant for purposes of Board law . . . the Board holds that an arbitration agreement that, as applied, precludes collective action in all forums is unlawful even if not a mandatory condition of employment, because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity.

Bristol Farms, 364 NLRB No. 34, slip op. at 1 fn. 3 (2016) citing *Haynes Building Srvs.*, 363 NLRB No. 125, slip op. at 3 fn. 12 (2016); *Bristol Farms*, 363 NLRB No. 45 (2015); and *On Assignment Staffing Srvs.*, 362 NLRB No. 189, slip op. at 1, 5-8 (2015), enf. denied No. 15-60642 (5th Cir. June 6, 2016). Thus, even assuming that employees were not required to be bound to the Arbitration Program as a condition of employment, the Program is still unlawful because it requires those employees who voluntarily signed the Agreement To Be Bound By Alternative Dispute Resolution Policy to prospectively waive their Section 7 right to engage in concerted activity which is contrary to settled Board precedent and federal law.

B. THE NOTICE POSTING REMEDY SOUGHT IN THE AMENDED COMPLAINT IS APPROPRIATE

As specified in the Amended Complaint, the General Counsel seeks an order requiring a notice posting in Spanish. This remedy is appropriate to remedy the alleged violations where a number of employees of Respondent are Spanish-speakers. Moreover, Respondent has stipulated that, "[i]n the event that the Administrative Law Judge and/or the Board find that Respondent violated the Act as alleged, Respondent will post a Notice to Employees in English and Spanish." [Jt. Motion at ¶ 15].

V. CONCLUSION

Based on the entire record in this matter and on the foregoing argument, Counsel for the General Counsel respectfully submits that Respondent violated Section 8(a)(1) as alleged in the Amended Complaint.

Dated at Los Angeles, California, this 21st day of July, 2016.

Respectfully submitted,

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